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UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

SAN FRANCISCO DIVISION

STATE OF CALIFORNIA *ex rel.* JAYDEEN) Case No. 07-cv-04911-SI
VICENTE and JAYDEEN VICENTE) Assigned to: Hon. Susan Illston
Individually,)
Relator,)
v.)
ELI LILLY AND COMPANY,) DEFENDANT ELI LILLY AND
Defendant.) COMPANY'S *EX PARTE* MOTION TO
) PLACE DOCUMENTS UNDER SEAL (L.R.
) 7-10; STANDING ORDER, PARAGRAPH 3)
)
) [Proposed] Order Granting Motion Filed
) Concurrently Herewith
)
)

1 TO ALL PARTIES AND THEIR ATTORNEYS OF RECORD:

2 PLEASE TAKE NOTICE THAT, as soon as the matter may be heard, Defendant Eli
 3 Lilly & Company (“Lilly”) will and hereby does move, pursuant to Local Rules 7-10, 79-5, and
 4 paragraph 3 of this Court's Standing Order, *ex parte* for an order granting Defendant leave to place
 5 under seal documents previously filed in this action. Timothy T. Scott, one of the counsel for Lilly,
 6 has advised Relator's counsel that such an *ex parte* request would be made to this Court. Said
 7 counsel has indicated that they will oppose such request.

8 This motion is based on this notice of motion, the accompanying memorandum, the
 9 Declarations of Timothy T. Scott, and Andrew R. Rogoff submitted herewith, the pleadings and
 10 other papers on file in this action, and on such other evidence and argument as may be presented to
 11 the court on reply and at the time of hearing.

12 **Background**

13 1. This action involves allegations about Zyprexa®, a pharmaceutical product
 14 manufactured by Lilly, and raises many issues that are already the subject of ongoing multidistrict
 15 proceedings before the Honorable Jack B. Weinstein in the United States District Court for the
 16 Eastern District of New York as *In Re Zyprexa Products Liability Litigation*, MDL No. 1596 (the
 17 “MDL”).¹

18 2. In the MDL, Judge Weinstein entered a protective order (“CMO-3,” attached
 19 to the Declaration of Andrew Rogoff (“Rogoff Dec.”) as Exhibit A; Rogoff Dec. at ¶ 3). That order
 20 was intended to protect confidential information and “[p][revent[] disclosures of documents” in
 21 order to “protect[] a vulnerable plaintiff patient population and avoid[] prejudice of potential jurors
 22 in any jury trial.” *See In re Zyprexa Injunction*, 474 F. Supp. 2d 385, 398 (E.D.N.Y. 2007).

23 3. The need for protection of confidential Zyprexa-related information has been
 24 an important subject in the MDL proceedings. In particular, as a result of a breach of CMO-3 in
 25 2006, which led to the disclosure of confidential Lilly documents to *The New York Times*, the MDL

27 ¹ As this case presents common legal and factual issues with the cases before Judge Weinstein, Lilly has requested that
 28 the Judicial Panel on Multidistrict Litigation (“JPML”) transfer this case to the MDL, pursuant to 28 U.S.C. § 1407(a)
 and consistent with past practice in similar cases.

1 Court issued several orders intended to protect Lilly's confidential information. The documents
 2 disclosed were, and are, subject to CMO-3.

3 4. Notwithstanding CMO-3's provisions, however, protected material was
 4 leaked to the press, thereby causing "irreparable harm" to Lilly "by revealing its trade secrets,
 5 confidential preliminary research, and merchandising techniques." *Id.* at 429. Among these
 6 documents were "a substantial number whose publication would be annoying, embarrassing,
 7 oppressive, and burdensome to Lilly," as "they reveal trade secrets, confidential preliminary
 8 research, development ideas, commercial information, product planning, and employee training
 9 techniques." *Id.* at 404.

10 5. These illegal disclosures of Lilly's confidential information led the MDL
 11 court to enter multiple orders enjoining the dissemination of the materials and requiring those in
 12 possession of those documents to return them. *Id.* at 405, 407, 408, 427-430.

13 6. CMO-3 continues to govern the MDL proceedings. All plaintiffs' counsel in
 14 the MDL have agreed to the terms of CMO-3, including Hersh & Hersh, Relator's counsel in this
 15 action.

16 **This Action**

17 7. This is a *qui tam* action on behalf of the State of California under the
 18 California False Claims Act, Cal. Gov't Code § 12650 *et seq.*, filed by Relator Jaydeen Vicente
 19 ("Relator") through her counsel Hersh & Hersh. Relator filed her complaint on May 11, 2007 under
 20 seal in the *Superior Court of the State of California in and for the City and County of San Francisco*,
 21 captioned as *State of California ex. rel. Jaydeen Vicente and Jaydeen Vicente Individually,*
 22 *Plaintiffs, v. Eli Lilly and Company*, Defendant, Case Number CGC-07-463338 (the "Complaint").
 23 Pursuant to Cal Gov't Code § 16252(c)(6)(B), the action has since been unsealed.

24 8. On September 21, 2007, Lilly removed the action to this court, based on
 25 federal question jurisdiction under 28 U.S.C. § 1331 and the principles set forth in *Grable & Sons*
 26 *Metal Prods., Inc. v. Darue Eng'g & Mfg*, 545 U.S. 308 (2005). See Lilly's Notice of Removal of
 27 Action Under 28 U.S.C. § 1441(B), filed September 21, 2007, pp. 5-13.

1 9. Relator worked for Lilly from 2001-2003. On July 16, 2001, Relator signed
 2 an “Employee Confidentiality and Invention Agreement,” (the “Confidentiality Agreement,”
 3 attached to Rogoff Dec. as Exhibit B; Rogoff Dec. at ¶ 7). The Confidentiality Agreement provides,
 4 among other things, that: (1) Lilly owns all information related to its products which is not generally
 5 known outside Lilly and that the employee will not disclose such information and (2) all materials
 6 prepared by an employee in connection with employment for Lilly belong to Lilly and that the
 7 employee will also return this information at the end of her employment.

8 10. As set forth in more detail below, the Confidentiality Agreement constitutes
 9 Lilly confidential and proprietary information and should itself be placed under seal.

10 11. Shortly before the end of her employment with Lilly, in accordance with the
 11 Confidentiality Agreement, Relator agreed to make arrangements for the “return of any property
 12 belonging to Eli Lilly & Co.” (*see* Relator’s July 24, 2003 e-mail, attached to Rogoff Dec. as Exhibit
 13 C; Rogoff Dec. at ¶ 8).

14 **The Confidential Complaint Materials**

15 12. Relator’s Complaint contains several confidential and highly sensitive
 16 documents as exhibits (“Confidential Complaint Materials”). Some of the Confidential Complaint
 17 Materials are essentially the same as documents produced in the MDL and protected by CMO-3. All
 18 of the Confidential Complaint Materials appear to be Lilly materials which Relator, in violation of
 19 the Confidentiality Agreement, failed to return at the end of her employment.

20 13. The Confidential Complaint Materials include:

<u>Reference</u>	<u>Basis for Confidentiality</u>
Ex. A to Cmpl.	Pages 3 and 5 are essentially the same as documents covered by CMO-3. The remaining pages contain information contemplated by CMO-3.
Ex. C to Compl.	Contains Lilly’s confidential human resources information
Ex. D to Compl.	Essentially the same as a document covered by CMO-3
Ex. E to Compl.	Essentially the same as a document covered by CMO-3
Ex. F to Compl.	Essentially the same as a document covered by CMO-3

1	Ex. G to Compl.	Essentially the same as a document covered by CMO-3
2	Ex. H to Compl.	Essentially the same as a document covered by CMO-3
3	Ex. I to Compl.	Contains information contemplated by CMO-3
4	Ex. J to Compl.	Contains information contemplated by CMO-3
5	Ex. K to Compl.	Contains information contemplated by CMO-3
6	Ex. L to Compl.	Contains information contemplated by CMO-3
7	Ex. M to Compl.	Contains information contemplated by CMO-3

9 See Rogoff Dec. at ¶ 7.

10 14. In accordance with 28 U.S.C. § 1446(b), Defendant's Notice of Removal,
 11 filed on September 21, 2007, attached a copy of the Complaint and its exhibits, including the
 12 Confidential Complaint Materials.

13 15. On October 2, 2007, Defendant's counsel asked Hersh & Hersh to enter into a
 14 stipulation that the Confidential Complaint Materials be placed under seal. Hersh & Hersh refused
 15 to enter into such a stipulation. Rogoff Dec. at ¶ 9. On October 9, 2007, Defendant's counsel
 16 informed Hersh & Hersh that they would be filing this *ex parte* motion. Hersh & Hersh stated that
 17 they would oppose the same. Declaration of Timothy T. Scott, at ¶ 2.

18 **Grounds For Placing Documents Under Seal**

19 16. Local Rule 79-5 provides in relevant part that:

20 A sealing order may issue only upon a request that establishes that the
 21 document, or portions thereof, is privileged or protectable as a trade
 22 secret or otherwise entitled to protection under the law, [hereinafter
 23 referred to as "sealable."] The request must be narrowly tailored to
 24 seek sealing only of sealable material, and must conform with Civil
 L.R. 79-5(b) or (c).

25 17. Here, this standard is clearly met with regard to the Confidential Complaint
 26 Materials. As to portions of Exhibit A and all of Exhibits D, E, F, G, and H, which are essentially
 27 the same as documents covered by CMO-3, the MDL Court has already determined that disclosure
 28 of this information would cause harm to Lilly and therefore warrants protection. In recognition of

1 this fact, the MDL Court has made considerable efforts to prevent the disclosure of these kinds of
 2 documents. *In re Zyprexa Injunction*, 474 F. Supp. 2d 385, 398 (E.D.N.Y. 2007). Relator's
 3 conduct threatens to undermine the MDL Court's ruling and to cause Lilly irreparable harm.

4 18. The remainder of Exhibit A as well as the entirety of Exhibits I, J, K, L, and
 5 M also merit protection. These documents contain "commercial information, product planning, and
 6 employee training techniques," *Id.* at 404, the disclosure of which would harm Lilly by "by
 7 revealing its trade secrets, confidential preliminary research, and merchandising techniques." *Id.* at
 8 429. In particular, these exhibits provide information regarding Lilly's Zyprexa marketing
 9 strategies, information which its competitors would not otherwise be able to obtain.

10 19. Exhibit C merits protection as well. It contains allegations brought to the
 11 attention of Lilly which are irrelevant and immaterial to the Complaint. In particular, this exhibit
 12 details Relator's complaints regarding the allegedly inappropriate conduct of a Lilly employee who
 13 is not a party to the case. These allegations do not bear any relation to Relator's causes of action.
 14 Moreover, allowing these records to remain public would threaten the Lilly employee's
 15 constitutionally-protected right of privacy. *See Cal. Const., art. I, § 1.* Public access to such
 16 documents via court files may be limited where –as here– the documents may be used for improper
 17 purposes, *e.g.*, "to gratify private spite or promote public scandal" or where court files would serve
 18 as "reservoirs of libelous statements." *Nixon v. Warner Comm., Inc.*, 435 U.S. 589, 598 (1978);
 19 *Hagestad v. Tragesser*, 49 F. 3d 1430, 1433-34 (9th Cir. 1995). As Exhibit C contains allegations
 20 completely immaterial to the underlying Complaint, it warrants protection; the converse would cause
 21 irreparable harm to Lilly.

22 20. Moreover, all of the Confidential Complaint Materials merit protection for the
 23 additional reason that they are Lilly's property pursuant to the terms of the Confidentiality
 24 Agreement. Relator signed that agreement, thereby recognizing harm that could result from
 25 disclosure of these documents. Relator is wrongfully in possession of these documents and remains
 26 in violation of the Confidentiality Agreement as the result of her decision to retain and disclose these
 27 documents.

21. The Confidentiality Agreement also merits protection. This document contains terms governing Relator's employment with Lilly, which constitute Lilly's proprietary and confidential information. Disclosure of this information would harm Lilly by making public the details of its employment contracts.

* * *

22. Lilly's request to file documents under seal is narrowly tailored and in accordance with the Court's Standing Order because the public will continue to have access to all information in the Complaint with the limited exceptions of the Confidential Materials described above. Accordingly, Lilly respectfully requests that this Court authorize the Clerk to place the Notice of Removal under seal.

Dated: October 10, 2007

SIDLEY AUSTIN LLP

By: /s/Timothy T. Scott
Timothy T. Scott

Attorneys For Defendant
ELI LILLY AND COMPANY